No. SC83777

IN THE SUPREME COURT OF MISSOURI

STE. GENEVIEVE SCHOOL DISTRICT R-II and MIKEL A. STEWART,

Appellants

vs.

BOARD OF ALDERMEN OF THE CITY OF STE. GENEVIEVE and GOLDEN MANAGEMENT, INC.

Respondents.

Appeal from the Circuit Court of St. Genevieve County
State of Missouri
The Honorable Kenneth W. Pratte, Circuit Judge

SUBSTITUTE BRIEF OF APPELLANTS STE. GENEVIEVE SCHOOL DISTRICT R-II and MIKEL A. STEWART

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Redevelopment Project will instead be collected as payments in lieu of taxes and expended for the purposes established in the Amendment; (3) payments in lieu of taxes and economic activity taxes collected in the area of the amended Redevelopment Project will be expended to fund or reimburse the costs of private parties to purchase and improve private property to such an extent that the expenditures amount to the illegal use of public funds for private purposes; and (4) Stewart is a taxpayer of the school district, City and County of Ste. Genevieve.

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Circuit Court of Ste. Genevieve County granting a motion to dismiss a Petition for a Declaratory Judgment brought by Appellant School District and its superintendent, as a taxpayer, challenging the validity of an amendment to a tax increment financing plan adopted by the Board of Aldermen of the City of Ste. Genevieve based on statutory and constitutional grounds. The appeal does not fall within the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, the Missouri Court of Appeals, Eastern District, had jurisdiction. Mo. Const. art. V, §3. This case was ordered transferred from that Court after opinion pursuant to Rule 83.04 and the Missouri Supreme Court now has jurisdiction pursuant to Article V, Section 10 of the Constitution of Missouri.

STATEMENT OF FACTS

Appellants Ste. Genevieve School District R-II ("School District") and Mikel Stewart, superintendent and taxpayer of the district, filed this action for a declaratory judgment on November 23, 1999, challenging the authority of the Board of Aldermen of the City of Ste. Genevieve (the "City") to adopt an Amendment to the "Point Basse Redevelopment Project" ("Redevelopment Project") previously approved by the City in 1997 pursuant to the Real Property Tax Increment Allocation Redevelopment Act,

sections 99.800-99.865, RSMo (the "TIF Act"). **L.F. 3-8**. The Petition both alleges failures by the City to comply with TIF Act and challenges the constitutionality of proposed expenditures of Payments in Lieu of Taxes ("PILOTs") under the Amendment. **L.F. 3-8**.

In its statutory challenge, the Petition alleges that the City failed to comply with two separate provisions of the TIF Act. First, the School District and Stewart allege that the City failed to comply with the requirement contained in section 99.820 requiring that school board representatives be reappointed to the TIF Commission prior to any amendments to redevelopment plans, projects or areas, and which specifically requires the TIF Commission to vote on amendments to redevelopment plans, projects or areas within thirty days following its hearing. **L.F. 5 ¶¶11-15**. It is undisputed that this did not occur, and this fact is recited in Section 3 of the city's ordinance approving the Amendment, which was attached to the Petition. **L.F. 12, Section 3**.

In addition, Appellants allege in their Petition that the Amendment changed the nature of the Redevelopment Project, and that under section 99.825 the City was specifically prohibited from adopting any ordinance changing the nature of the Redevelopment Project without first complying with the procedures in that section applicable to initial approval of a redevelopment plan, project, or area. **L.F. 3-4, ¶¶ 3-9**. Again, the City has admitted in section 3 of its Ordinance that it did not comply with such procedures. **L.F. 12, Section 3**.

In addition to advancing these statutory grounds in support of its Petition for a declaratory judgment, Appellants alleged in their Petition that the PILOTs and Economic Activity Taxes collected pursuant to the TIF Act are public funds. The Petition further alleges that the Amendment provides for the expenditure of such public funds for the purpose of buying private land for the developer's ownership, improving that land, and relocating tenants on that land; and that such expenditures would constitute illegal expenditure of public funds for a private purpose under Article 3, § 38 (a), §39(1)(2), and Article VI, §23 and §25 of the Constitution of Missouri. **L.F. 7, ¶¶ 19, 23-27**. Appellants served a copy of the Petition on the Attorney General pursuant to Rule 87.04. **L.F. 1**.

The City filed a motion to dismiss on December 23, 1999, claiming that the case should be dismissed because the facts pleaded showed the Ordinance was valid, for failure to join necessary parties, lack of standing, and failure to state a claim. **L.F. 1, 28-48**.[1] Appellants filed their suggestions in opposition to the City's Motion to Dismiss on January 18, 2000. **L.F. 1**.

On January 18, 2000, the trial court ordered Golden Management, the developer under the Redevelopment Project, added as a party. Golden Management filed its Motion to Dismiss on February 25, 2000, based on lack of standing and the failure to state a claim. **L.F. 1, 50**.

[1] The City also filed a Motion for Sanctions against the Appellants and their attorney for filing a "frivolous" suit, however it never took up its motion.

On March 21, 2000, the trial court sustained the Motions of Respondents to Dismiss the Petition. **L.F. 51**. On March 23, 2000 the trial court entered an Amended Order and Judgment dismissing the Petition for the reason that the Plaintiffs lacked standing, and that even if they had standing, for failure to state a claim upon which relief can be granted. **L.F. 52**.

The Missouri Court of Appeals, Eastern District, filed an opinion in the case on April 3, 2001, affirming the judgment of the trial court, to which Appellants timely filed their motions for rehearing and/or transfer. On May 29, the Missouri Court of Appeals, Eastern District, ordered the previous opinion withdrawn and issued another opinion affirming the judgment of the trial court, to which Appellants once again timely filed their motions for rehearing and/or transfer. Appellants' motions for rehearing and/or transfer were denied on July 3, 2001, and Appellants timely filed their Application for Transfer in this Court. This Court ordered the case transferred on August 21, 2001.

POINTS RELIED ON

I.

The trial court erred in dismissing the Petition for a Declaratory Judgment as to Ste. Genevieve School District R-II and Mikel Stewart for lack of standing, because the Petition pleaded facts establishing that the School District and Stewart each had a legally cognizable interest in the subject matter of the suit and a threatened or actual injury sufficient to support standing, in that the Petition alleged that (1) the City adopted an Amendment to the Redevelopment Project without first complying with

mandatory statutory provisions requiring School District representatives to be reappointed to the TIF Commission, to participate in required hearings and to vote on the Amendment; (2) amounts that would otherwise be collected as school revenues within the area of the Redevelopment Project will instead be collected as payments in lieu of taxes and expended for the purposes established in the Amendment; (3) payments in lieu of taxes and economic activity taxes collected in the area of the amended Redevelopment Project will be expended to fund or reimburse the costs of private parties to purchase and improve private property to such an extent that the expenditures amount to the illegal use of public funds for private purposes; and (4) Stewart is a taxpayer of the school district, City and County of Ste. Genevieve.

Superior Equipment Company, Incorporated v. Maryland Casualty Company, 936 S.W.2d 190 (Mo. App. E.D. 1996).

State ex rel. School District of the City of Independence v. Jones, 653 S.W.2d 178 (Mo. banc. 1983).

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Regal-Tinneys Grove Special Road District v. Fields, 552 S.W.2d 719 (Mo. banc 1977).

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Harness v. State Farm Mut. Auto. Ins. Co., 867 S.W.2d. 591 (Mo. App. E.D. 1993).

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State ex rel. Reorganized School District R-9 v. Windes, 513 S.W.2d 385 (Mo 1974).

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Southern Reynolds County School District R-2 v. Callahan, 313 S.W.2d 35 (Mo. 1958).

School District 24 v. Neaf, 347 Mo 700, 148 S.W.2d 554 (Mo. 1941).

School District of Kansas City v. Smith, 342 Mo. 21, 111 S.W.2d 167 (Mo 1937).

School District of Oakland v. School District of Joplin, 340 Mo. 779, 102 S.W.2d 909 (Mo.1937).

§99.820, RSMo Supp. 1998.

§99.825, RSMo Supp. 1997.

Mo. Const. art III, § 38(a); §39(1)(2).

Mo. Const. art.VI, §23; §25.

II.

The trial court erred in dismissing the Petition for a Declaratory Judgment as to Ste. Genevieve School District R-II and Mikel Stewart for failure to state a claim, because the Petition pleaded facts establishing that the School District and Stewart

were entitled to a declaration concerning the validity of the challenged amendment under the statutes and constitutional provisions cited, in that the Petition alleged that (1) the City adopted an Amendment to the Redevelopment Project without first complying with mandatory statutory provisions requiring School District representatives to be reappointed to the TIF Commission, to participate in required hearings and to vote on the Amendment; (2) amounts that would otherwise be collected as school revenues within the area of the Redevelopment Project will instead be collected as payments in lieu of taxes and expended for the purposes established in the Amendment; (3) payments in lieu of taxes and economic activity taxes collected in the area of the amended Redevelopment Project will be expended to fund or reimburse the costs of private parties to purchase and improve private property to such an extent that the expenditures amount to the illegal use of public funds for private purposes; and (4) Stewart is a taxpayer of the school district, City and County of Ste. Genevieve.

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Rathjen v. Reorganized School District R-II of Shelby County, 284 S.W.2d 516 (Mo. banc 1955).

State ex rel. Mitchell v. City of Sikeston, 555 S.W. 2d 281 (Mo. banc 1977).

Graves v. Little Tarkio Drainage District No. 1, 134 S.W.2d 70, 345 Mo. 557 (Mo. 1940).

Buechner v. Bond, 650 S.W.2d 611 (Mo. banc 1983).

Boone County Court v. State, 631 S.W.2d 321 (Mo. banc. 1982).

County of Jefferson v. Quicktrip Corp. 912 S.W.2d 487 (Mo. banc 1995).

Gott v. Director of Revenue, 5 S.W.3d 155 (Mo. banc 1999).

Harness v. State Farm Mut. Auto. Ins. Co., 867 S.W.2d. 591 (Mo. App. E.D. 1993).

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Wilson v. Director of Revenue, 873 S.W.2d. 328, 329 (Mo. App. E.D. 1994).

§99.820, RSMo Supp. 1998; §99.825, RSMo Supp. 1997.

Mo. Const. art III, § 38(a); §39(1)(2).

Mo. Const. art.VI, §23; §25.

Rule 84.14.

ARGUMENT

I.

The trial court erred in dismissing the Petition for a Declaratory Judgment as to St. Genevieve School District R-II and Mikel Stewart for lack of standing, because the Petition pleaded facts establishing that the School District and Stewart each had a legally cognizable interest in the subject matter of the suit and a threatened or actual injury sufficient to support standing, in that the Petition alleged that (1) the City adopted an Amendment to the Redevelopment Project without first complying with mandatory statutory provisions requiring School District representatives to be reappointed to the TIF Commission, to participate in required hearings and to vote on the Amendment; (2) amounts that would otherwise be collected as school revenues within the area of the Redevelopment Project will instead be collected as payments in lieu of taxes and expended for the purposes established in the Amendment; (3) payments in lieu of taxes and economic activity taxes collected in the area of the amended Redevelopment Project will be expended to fund or reimburse the costs of private parties to purchase and improve private property to such an extent that the expenditures amount to the illegal use of public funds for private purposes; and (4) Stewart is a taxpayer of the school district, City and County of Ste. Genevieve.

A. Standard of Review

The standard of review of the appeal of a judgment sustaining a motion to dismiss, and in particular a motion to dismiss a petition for a declaratory judgment, is well-established and has been described as follows:

> "In determining whether any petition, including one purporting to state a cause of action for a declaratory judgment, states a claim, we accept as true all the facts pleaded and all the reasonable inferences drawn therefrom in order to determine whether the petition states any grounds for relief. *Harness v. State Farm Mut. Auto. Ins. Co.*, 867 S.W.2d. 591, 592 (Mo. App. E.D. 1993). A petition should be held sufficient if it invokes substantive principals of law which entitle the plaintiff to relief. *Washington Univ. v. Royal Crown Bottling Co. of St. Louis*, 801 S.W.2d 458, 463 (Mo. App. 1990). <u>The test for the sufficiency of a petition for declaratory judgment is not whether the plaintiff is entitled to the relief prayed for, but whether he is entitled to a declaration of rights or status on the facts pleaded.</u> *Cooper v. State*, 818 S.W.2d. 653, 655 (Mo. App. 1991). <u>If the averments are sufficient to show the propriety of declaratory relief, it is improper to dismiss the petition.</u> *Royal Crown*, 801 S.W.2d at 463."

Superior Equipment Company, Incorporated v. Maryland Casualty Company, 936 S.W.2d 190, 191-192 (Mo. App. E.D. 1996)(emphasis added).

B. <u>Appellant Ste. Genevieve School District R-II pleaded sufficient facts to establish standing to bring its statutory and constitutional</u>

challenge to the City's Amendment to the Redevelopment Project.

The questions before the court regarding standing are (1) whether the School District and/or Stewart have standing to seek a declaration that the City was required to appoint members of the school board to the tax increment financing commission before adopting the Amendment to the Redevelopment Project and to refer such Amendment to the tax increment financing commission for prior hearings and a vote under sections 99.820 and 99.825, RSMo.; and (2) whether the School District and/or Stewart have standing to challenge the constitutionality of proposed expenditures under such Redevelopment Project Amendment as public funds expended for a private purpose. The circuit court stated in its judgment that the Appellants each lacked standing to bring such claims. **L.F. 52**. The Petition is set forth as an Appendix to this Brief.

Tax Increment Financing (TIF) has been the subject of considerable controversy in Missouri over the last decade. Taxing entities, and in particular, school boards, complained that TIF allowed the appropriation of their revenues by another governmental body without any opportunity to have a role in the decision-making process. In 1991, the legislature responded to these complaints by providing for mandatory participation by school districts and other taxing entities on TIF commissions, which are required to conduct public hearings on proposed redevelopment plans, projects and areas and to vote on the same before they are considered for final approval (L. 1991, H.B. 502). School boards are specifically identified in the statute, and are provided two seats on each TIF Commission, while the other taxing entities are all represented as a group by one

member, with certain exceptions applicable to the state's metropolitan areas. §99.820, RSMo.

It is clear, therefore, that the legislature intended for school districts to have a significant role in considering proposed redevelopment plans, projects and the designation of redevelopment areas. It is equally clear, based upon the express language of §99.820, that the legislature intended the school district representatives to have a role in the consideration of *any amendments to redevelopment projects* ("shall be appointed as provided in this section prior to any amendments . . . to any . . .redevelopment projects . . ").[2] If neither the School District nor Stewart have standing to challenge the City's failure to comply with a statute that requires school boards to be represented on TIF commissions and to conduct hearings on and to vote upon proposed amendments to redevelopment projects, then the statutory requirement is unenforceable, and therefore meaningless.

This Court has previously held that a school district has standing to bring a declaratory judgment action under section 527.020 where questions of statutory construction are clearly involved. *State ex rel. School District of the City of Independence v. Jones*, 653 S.W.2d 178, 184 (Mo. banc. 1983). This Court has also held that a "declaratory judgment action provides an appropriate method of determining controversies concerning the construction of statutes and the powers and duties of

[2] The specific relevant provisions of this statute and 99.825 are set forth in Point II of the Argument.

governmental agencies thereunder, provided the court is presented with a justiciable controversy, ripe for determination brought by someone with standing by having a legally protectible interest at stake, in a case wherein a judgment conclusive in character which settles the issues involved may be entered." *Regal-Tinneys Grove Special Road District v. Fields*, 552 S.W.2d 719, 722 (Mo. banc 1977); *State ex rel. School District of the City of Independence, et al. v. Jones, et al.*, 653 S.W.2d 178, 184-185 (Mo. banc 1983).

Relevant to the School District's standing as well as Stewart's standing to make their claims, the Petition alleges that:

(1) In adopting the amendment to the Point Basse Redevelopment Project the City failed to comply with the requirement contained in section 99.820 requiring that school board representatives be reappointed to the TIF Commission prior to any amendments to redevelopment plans, projects or areas, and which specifically requires the TIF Commission to vote on amendments to redevelopment plans, projects or areas within thirty days following its hearing. **L.F. 5 ¶¶11-15; L.F. 12, Section 3**; **Appendix-3;**

(2) The amendment to the Point Basse Redevelopment Project changed the nature of the redevelopment project, and that under section 99.825 the City was specifically prohibited from adopting any ordinance changing the nature of the redevelopment project without first complying with the procedures in that section applicable to initial approval of a redevelopment plan, project, or area. **L.F. 3-4, ¶¶ 3-9; L.F. 6-7 ¶¶17-23**; **L.F. 17; Appendix 1-2, 4-5, 15;**

(3) The Point Basse Redevelopment Project, as amended, is within the School District's boundaries, and that amounts otherwise payable to the school district as taxes within such area will instead be paid into a separate fund and used for development costs in such project area. **L.F. 5-6, ¶16**; **Appendix 3-4;**

(4) The amendment to the Point Basse Redevelopment Project provides for the expenditure of public funds for the purpose of buying private land for the private developer's ownership, improving that land, and relocating tenants on that land; and such expenditures would constitute illegal expenditure of public funds for a private purpose under Article 3, § 38 (a), §39(1)(2), and Article VI, §23 and §25 of the Constitution of Missouri **L.F. 6, ¶19; L.F. 7, ¶¶ 23-27; L.F. 17; Appendix 4-5, 15;**

(5) Stewart is a taxpayer of the School District City and County of Ste. Genevieve. **L.F. 3, ¶ 2; Appendix 1.**

Taking these factual allegations as true, and disregarding legal conclusions, the School District has met the test for standing enunciated by the Missouri Supreme Court in *State ex rel. School District of the City of Independence, et al. v. Jones and Regal-Tinneys Grove Special Road District v. Fields*, discussed above:

(1) The School District' s Petition sought an interpretation of statutes and the Missouri Constitution, and raised legal questions regarding to the powers and duties of the City thereunder;

(2) The case is justiciable and ripe for determination because the City has adopted the amendment to the Point Basse Redevelopment Project and has stated in section 3 of its ordinance that it is not required to comply with the statutes raised by the School District;

(3) The School District has a legally protectible interest at stake by virtue of its statutory right to participate in TIF commission review, by way of hearing and vote, on any amendment to a redevelopment project or any ordinance changing the nature of a redevelopment project. In addition, the School District has an interest in seeing that its tax revenues are not illegally appropriated; and

(4) A judgment, conclusive in character, and which disposes of the issues in the case is available and was requested.

This Court has stated that "Standing requires that the party seeking relief have a legally cognizable interest in the subject matter and that he has a threatened or actual injury." *Eastern Missouri Laborers District Council v. St. Louis County et al.*, 781 S.W.2d 43, 46 (Mo. banc 1989); *Metro Auto Auction v. Director of Revenue*, 707 S.W.2d 397, 400 (Mo. banc 1986). In this case, the School District has a legally cognizable interest in its statutorily created right to participate in hearings reviewing proposed amendments to redevelopment projects and voting upon such amendments. The district has an actual injury because it has been denied that right by the City in this case. It also has a legally cognizable interest based on the fact that if the Amendment to the

Redevelopment Project was illegally adopted, as alleged, the School District's tax revenues will be illegally diverted.

Respondent argued in the trial court that the School District lacked standing because the total redevelopment costs under all the projects in the redevelopment plan, of which the Point Basse Redevelopment Project is a part, are the same before and after the amendment to the Point Basse Redevelopment Project.[3] Thus, the argument goes, Appellants do not benefit from a ruling in their favor and therefore lack standing because there is no justiciable controversy. Under this argument, the school district's statutory right to be represented on the TIF commission for consideration of, and to vote upon, amendments to redevelopment plans, projects or areas, as provided in section 99.820, is not enforceable unless the school district can also prove that the total cost of all of the projects included in a redevelopment plan is increased as the result of the amendment.

The main problem with this interpretation is that there is simply no support for it in this statute. Also, section 99.825 requires any ordinance changing the nature of a redevelopment project to be submitted to prior TIF commission review. Neither of these statutes conditions a school district's right to participate in TIF commission hearings or right to vote on amendments to redevelopment projects or ordinances changing the nature

[3] Proposed redevelopment costs in other projects were reduced by the amount of the increase to the Point Basse Project. Redevelopment plans may include numerous redevelopment projects, however, sections 99.820 and 99.825 apply to each project on an individual basis.

of redevelopment projects on any kind of financial test. But for the City's failure to follow the statutory procedure, the Amendment may not have been adopted, and the Redevelopment Project as it existed prior to the Amendment may or may not have continued. In addition, Respondent's "no pecuniary loss" argument ignores that fact that both the School District and Stewart have the right to challenge the illegal diversion or expenditure of public funds, as Appellants alleged in their Petition.

Ste. Genevieve School District R-II need not show pecuniary harm in order to have standing. Its statutory right to participation on the TIF Commission to hear, consider, and vote upon any amendments to redevelopment plans, projects and areas under the TIF Act is a sufficient interest. However, the School District also has standing to contest the illegal diversion of its tax revenues or the expenditure of public funds for a private purpose, because the rule in Missouri is that "absent legislation to the contrary and so long as in furtherance of its duties, a school district is empowered to initiate any action that would be available to a private individual in the same circumstances." *State ex rel. School District of the City of Independence, et al. v. Jones, et al.*, 653 S.W.2d 178, 186 (Mo. banc 1983). The school district has an interest in seeing that if its tax revenues are redirected for another purpose, that purpose is a legal one. If not, the funds can not be redirected and would be collected as taxes and remitted to the school district.[4]

[4] While Respondent may argue that the total amount spent on all projects under the redevelopment plan was no greater after the Amendment to this Project than before, this does not change the fact that if this Project is unlawful, either for statutory or

The School District's standing to bring both its statutory and constitutional challenge is supported by this Court's broad construction of school district standing, discussed in *State ex rel. School District of the City of Independence, et al. v. Jones, et al.*:

> "While school districts are not sovereigns, but creatures of the legislature whose only powers are those expressly granted by or necessarily implied from statute, the capacity of a school district to sue and its authority to prosecute actions required to protect and preserve school funds and property is necessarily implied from the district's duty to maintain schools and conduct instruction within its boundaries. Multitudinous are the common law and equitable actions that have been initiated by school districts without express statutory authorization and determined on the merits. A partial list of such cases decided by this Court includes: *Eminence R-I School District v. Hodge*, 635 S.W.2d 10 (Mo. 1982) (suit for injunction and declaratory judgment as to whether county court was required by statute to distribute to plaintiff school district a portion of forest reserve funds); *State ex rel. Fort Zumwalt School District v. Dickherber*, 576 S.W.2d 532(Mo. banc (1979) (mandamus to compel county auditor to

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constitutional reasons, then the payments in lieu of taxes for that project area can not be collected and taxes rather than payments in lieu of taxes would still be applicable to that project area.

countersign checks for payment of interest on school tax moneys collected by county); *State ex rel. Reorganized School District R-9 v. Windes*, 513 S.W.2d 385 (Mo. 1974) (certiorari from determination of arbitration board on apportionment of property); *School District of Mexico v. Maple Grove School District No. 56*, 359 S.W.2d 743 (Mo. 1962) (action to recover from adjoining school district tuition payments allegedly due under statute); *Bloomfield Reorganized School District No. R-14 v. Stites*, 336 S.W.2d 95 (Mo. 1960) (breach of contract); *Southern Reynolds County School District R-2 v. Callahan*, 313 S.W.2d 35 (Mo. 1958) (ejectment and establishment of title by adverse possession); *School District 24 v. Neaf*, 347 Mo 700, 148 S.W.2d 554 (Mo. 1941) (injunction to restrain County Assessor from treating certain property as personalty rather than realty for tax purposes); *School District of Kansas City v. Smith*, 342 Mo. 21, 111 S.W.2d 167 (Mo 1937) (declaratory judgment as to whether 1935 sales tax imposed tax on transactions to which school district was a party); *School District of Oakland v. School District of Joplin*, 340 Mo. 779, 102 S.W.2d 909 (Mo. 1937) (action to quiet and determine title and for ejectment, damages and monthly rents and profits)."

Id. at 185-186.

C. <u>Appellant Mikel Stewart pleaded sufficient facts to establish his standing to bring a statutory and constitutional challenge to the</u>

City's Amendment to the Redevelopment Project.

As a taxpayer, Stewart has standing to challenge the proposed unlawful expenditure of public funds, and based upon the same grounds as the School District. As a taxpayer, Stewart had a right to attend and participate in the TIF commission's public hearings required under section 99.820 and 99.825, but which were never held. Respondent argued below that the test for taxpayer standing in *Eastern Missouri Laborers District Council v. St. Louis County* excludes Stewart, because he can not show a pecuniary loss. However, in that case, this Court retreated from its previous strict requirement of showing a pecuniary loss in order to obtain taxpayer standing, and specifically indicated that a taxpayer's interest in the proper use and allocation of tax receipts is sufficient to confer standing to bring suit to challenge the improper use of tax funds. *Eastern Missouri Laborers District Council v. St. Louis County et al.*, 781 S.W.2d 43, 46-47 (Mo. banc 1989). The Court conferred taxpayer standing in that case if the taxpayer can show a direct expenditure of public funds in connection with the challenged transaction. *Id.* at 47. The Petition clearly alleges that payments in lieu of taxes are public funds, details private purposes for which they are proposed for expenditure pursuant to the amendment, quantifies the amount proposed, and states that the City's effort to grant them to a private party are illegal. **L.F. 6, ¶ 19; L.F. 7, ¶¶ 24-27; Appendix 4-5; L.F. 17-18.** Likewise, the Petition alleges that the economic activity taxes are public funds, that private grants of such tax revenues for the purposes stated in the Petition are illegal, and that Stewart is a taxpayer of the City and County. **L.F. 3, ¶ 2;**

L.F. 7, ¶¶ 25-27; Appendix 1, 5. The Petition also alleges that PILOTs unlawfully collected pursuant to the amendment would otherwise have accrued to the School District, and that Stewart is a taxpayer of the district. **L.F. 3, ¶ 2, 5-6, ¶ 16; Appendix 1, 3-4**. Thus, Stewart meets the test for taxpayer standing as a taxpayer of the school district as to PILOTS, as a taxpayer of the City and/or County as to economic activity taxes, and for the loss of his right as a taxpayer to participate in public hearings on the Amendment as required by statute.

Respondents have indicated that since PILOTs under TIF are not taxes under the holding in *Tax Increment Financing Commission v. Dunn Construction Co.*, 781 S.W.2d 70 (Mo. banc 1989), there can be no taxpayer standing in this case. However, it is Appellants' position that PILOTs are still public funds, and their expenditure should still be subject to challenge by a taxpayer as a matter of law and public policy. The TIF Act itself makes it clear that a municipality's authority to acquire property under TIF is subject to constitutional restrictions. §99.820(3). Respondents have advanced an argument that all expenditures proposed pursuant to TIF are per se constitutional because they further the public purpose of redevelopment. However, such a generalization would permit TIF to be used as way of laundering public money for what are essentially private uses.

II.

The trial court erred in dismissing the Petition for a Declaratory Judgment as to St. Genevieve School District R-II and Mikel Stewart for failure to state a claim,

because the Petition pleaded facts establishing that the School District and Stewart were entitled to a declaration concerning the validity of the challenged amendment under the statutes and constitutional provisions cited, in that the Petition alleged that (1) the City adopted an amendment to the Redevelopment Project without first complying with mandatory statutory provisions requiring School District representatives to be reappointed to the TIF Commission, to participate in required hearings and to vote on the Amendment; (2) amounts that would otherwise be collected as school revenues within the area of the Redevelopment Project will instead be collected as payments in lieu of taxes and expended for the purposes established in the Amendment; (3) payments in lieu of taxes and economic activity taxes collected in the area of the amended Redevelopment Project will be expended to fund or reimburse the costs of private parties to purchase and improve private property to such an extent that the expenditures amount to the illegal use of public funds for private purposes; and (4) Stewart is a taxpayer of the school district, City and County of Ste. Genevieve.

The same facts alleged in the Petition that support the standing of Stewart and the School District to bring its constitutional and statutory challenge, assumed to be true for purposes of this appeal, together with all reasonable inferences therefrom, also show that the trial court erred in determining that the School District and Stewart failed to state a claim. As stated under Point I, the test for the sufficiency of a petition for a declaratory judgment is not whether the plaintiff is entitled to the relief prayed for, but whether he is

entitled to a declaration of rights or status on the facts pleaded. If the averments are sufficient to show the propriety of declaratory relief, it is improper to dismiss the petition. *Superior Equipment Company, Incorporated v. Maryland Casualty Company,* 936 S.W.2d 190, 191-192 (Mo. App. E.D. 1996).

A. <u>In their Petition, Appellants not only stated a claim for which relief may be granted under sections 99.820 and 99.825, RSMo, they also demonstrated that they were entitled to judgment under such statutes.</u>

The information in the Petition, together with the attached ordinance containing the Amendment to the Redevelopment Project, does more than show that Appellants were entitled to a declaration of rights under the TIF Act. As the following analysis demonstrates, the application of the applicable statutory provisions to the *undisputed* contents of the amendment, attached to the Petition, demonstrate that Appellants are entitled to a judgment invalidating the amendment to the Point Basse Redevelopment Project because it was adopted without first appointing the TIF Commission, conducting hearings on the amendment, and allowing the Commission to take its vote concerning a recommendation to the City as required by law. Accordingly, under Rule 84.14, this Court could decide the School District's statutory arguments on the merits and invalidate the amendment to the Point Basse Redevelopment Project itself or remand the case to the trial court with directions on the City's failure to comply with sections 99.820 and/or 99.825. If the amendment to the Point Basse Redevelopment Project is determined by this Court to be void as the result of failure by the City to comply with the relevant

statutes, then the School District's constitutional argument, while improperly dismissed, would become moot unless and until the City adopted another amended redevelopment project subject to the same challenge.[5]

For purposes of analysis, Appellants have divided the relevant portions of 99.820 into two separate designated parts, and have divided the relevant portions of 99.825 into three separate designated parts. The dates in the citation after each section show the most recent date that the section was revised and reenacted by the legislature.

Part 1, Section 99.820

> " . . . Thereafter the commission shall consist of the six members appointed by the municipality, except that members representing school districts and other taxing entities shall be appointed as provided in this section prior to any amendments to any redevelopment plans,

[5] This case was initially filed as a writ of prohibition, and although there is no record of its disposition, the preliminary order was not entered because of the argument at hearing that the School District had a legal remedy in the form of a declaratory judgment. After delays resulting from the addition of Golden Management as a party, the trial court finally determined that the School District had no standing, much less the remedy of a declaratory judgment. A remand to the trial court without any direction will result in further unnecessary delay and probable subsequent appeals. The actions taken by the City are not in dispute, and appear on the face of the ordinance.

redevelopment projects, or designation of a redevelopment area. §99.820.2(6), RSMo Supp. 1998. (emphasis added).

Part 2, Section 99.820

"3. The commission, subject to the approval of the governing body of the municipality, may exercise the powers enumerated in sections 99.800 to 99.865, except final approval of plans, projects, and designation of redevelopment areas. The commission shall hold public hearings and provide notice pursuant to sections 99.825 and 99.830. The commission shall vote on all proposed redevelopment plans, redevelopment projects and designations of redevelopment areas, and amendments thereto, within thirty days following completion of the hearing on any such plan, project or designation and shall make recommendations to the governing body within ninety days of the hearing referred to in section 99.825 concerning the adoption of, or amendment to redevelopment plans and redevelopment projects and the designation of redevelopment areas. The requirements of subsection 2 of this section and this subsection shall not apply to redevelopment projects upon which the required hearings have been duly held prior to August 31, 1991." §99.820, RSMo Supp. 1998 (emphasis added).

Part 1, Section 99.825

" . . . The commission shall hear and consider all protests, objections, comments and other evidence presented at the hearing. The hearing may be continued to another date without further notice other than a motion to be entered upon the minutes fixing the time and place of the subsequent hearing. Prior to the conclusion of the hearing, *changes may be made* in the redevelopment plan, redevelopment project, or redevelopment area, provided that each affected taxing district is given written notice of such changes at least seven days prior to the conclusion of the hearing. §99.825.1, RSMo Supp. 1997 (emphasis added).

Part 2, Section 99.825

After the public hearing, but prior to the adoption of an ordinance approving a redevelopment plan or redevelopment project, or designating a redevelopment area, changes *may be made* to the redevelopment plan , redevelopment projects or redevelopment areas without a further hearing, if such changes do not enlarge the exterior boundaries of the redevelopment area or areas, and do not substantially affect the general land uses established in the redevelopment plan or *substantially change the nature* of the redevelopment projects, provided that notice of such changes shall be given by mail to each affected taxing district and by publication in a newspaper of general circulation in the area of the proposed redevelopment

not less than ten days prior to the adoption of the changes by ordinance. §99.825.1, RSMo Supp. 1997 (emphasis added).

Part 3, Section 99.825

After the adoption of an ordinance approving a redevelopment plan or redevelopment project, or designating a redevelopment area, *no ordinance shall be adopted* altering the exterior boundaries, affecting the general land uses established pursuant to the redevelopment plan or *changing the nature* of the redevelopment project without complying with the procedures provided in this section pertaining to the initial approval of a redevelopment plan or redevelopment project and designation of a redevelopment area. . . " §99.825.1, RSMo Supp. 1997 (emphasis added).

The Respondent City, in its motion to dismiss, relied upon the language in section 99.825 above identified as Part 3, and with reference to that language stated that "Finally, after a redevelopment plan is adopted by ordinance, a new hearing and recommendation by the TIF Commission are required only for very significant changes . . ."

The City has totally mischaracterized the language of what has been identified above as Part 3 of section 99.825. First of all, it should be noted that the subject matter of subsection 1 of this section is devoted generally to the powers and duties of the *TIF Commission*, and exceptions to and restrictions upon those powers and duties. There is no indication that it is intended to operate as a grant of authority to the municipality. In Part 1 of 99.825, shown above, the permitted changes to plans, projects and areas are only

possible when the TIF Commission hearings are still in progress, and then only if written notice is given to the taxing districts at least seven days prior to the end of the hearing. In contrast to Part 3 of this section, it specifically states that "changes may be made" and describes the procedure for making such changes during the pendency of the hearings. There is no substantive limit on the changes that may be made, because the TIF commission is still meeting, including the school district and other taxing entities, who can comment or object to the changes. There is nothing in the language identified above as Part 1 of section 99.825 that is inconsistent with the clear language of section 99.820 stating "except that members representing school boards and other taxing districts shall be appointed as provided in this section prior to any amendments to any . . . redevelopment projects . . " and requiring the TIF commission to vote on all amendments. At this stage, there is no need for amendment because no ordinance has been adopted.

Part 2 of section 99.825, as shown above, describes circumstances in which further changes can be made following the TIF commission's hearings and *before* an ordinance is adopted *without requiring the TIF commission to conduct an additional public hearing*. Nothing in Part 2 of section 99.825 above is inconsistent with the clear requirement stated in section 99.820 that any redevelopment plans, projects, or area designations, or amendments thereto, are required to be submitted to the TIF commission and that the commission is allowed to vote on the same. *These changes are not described as amendments, because no ordinance has been adopted.* Importantly, this Part II of section

99.825, like Part 1, and in contrast to Part 3, expressly states that "changes may be made" and describes the substantive standard applicable to such changes.

Part 3 of section 99.825 shown above was cited by the City below as the basis for its authority to adopt amendments without first submitting them to the TIF Commission for hearing and vote as expressly required by section 99.820. There are several problems with this expansive reading. First of all, *there is nothing in this language that refers expressly to "amendments"* to redevelopment plans, projects or areas. In contrast, section 99.820 specifically requires that school board representatives "**shall be appointed**" to the TIF commission prior to "***any amendments***" to "**any**" redevelopment plans, **projects** or areas already adopted by ordinance. It uses the term "shall" to indicate that the requirement is mandatory. Secondly, *this language in section 99.825 is stated as a restriction, not as a grant of authority*. In contrast to Parts 1 and 2 of section 99.825 shown above, the language in Part 3 does not state that the City *may* adopt changes, much less "amendments", so long as they do not enlarge the boundaries, change the land uses, or change the nature of a project.

The success of the City's argument under what Appellants have designated as Part 3 of section 99.825 requires the express language of section 99.820 requiring all *amendments* to a plan previously adopted by ordinance to be submitted to notice, hearing, and vote by the TIF Commission to be *subordinated to an inference* to be drawn from a *prohibition* stated in another section against certain ordinances. Courts must give effect to an express provision rather than an implication. *Rathjen v. Reorganized School District*

R-II of Shelby County, 284 S.W.2d 516, 522 (Mo. banc 1955). If the prohibition in what has been identified as Part 3 of 99.825 is read as a grant of authority to adopt amendments to a redevelopment project previously approved by ordinance, that interpretation would be in conflict with the direct, mandatory language of section 99.820 to the contrary. It is well established that "a statute should be so construed that effect should be given to all of its provisions, so that no part, or section, will be inoperative, superfluous, contradictory, or conflicting, and so that one section, or part, will not destroy another." *Graves v. Little Tarkio Drainage District No. 1,* 134 S.W.2d 70, 78, 345 Mo. 557, 569 (Mo. 1940). The interpretation proposed by Respondent eviscerates the express language of section 99.820.

Also, it should be noted that the most recently adopted version of section 99.820, RSMo was adopted in 1998, and became effective *after* the existing version of section 99.825, RSMo, which was adopted in 1997. If the legislature had intended anything in section 99.825 to provide an exception to the requirement to submit amendments to redevelopment projects to the TIF Commission as provided in section 99.820, that clarification could have been added to section 99.820. To the extent that provisions of 99.820 and 99.825 are in direct conflict, then the language of 99.820, the more recently enacted statute, "operates to the extent of the repugnancy to repeal the first." *County of Jefferson v. Quicktrip Corp.* 912 S.W.2d 487, 490 (Mo. banc 1995).

In the context of the other two parts of section 99.825 shown above, both of which identify situations in which certain changes *can* be made in proposed redevelopment

plans, projects and areas, and neither of which limits the authority of the TIF commission, it appears that Part 3 was intended merely as a summary prohibition against taking further action of the kind identified in Part 2 by ordinance. It is not necessary to read it as a grant of authority to adopt amendments to a redevelopment project following adoption of that project by ordinance when that reading is in direct conflict with operative language of section 99.820 to the contrary. There is simply no reasonable argument, applying normal rules of statutory interpretation, that an inference drawn from Part 3 of this section as designated above can "trump" the clear requirement stated three times in section 99.820 that any amendments to redevelopment projects must be submitted to the TIF Commission. *Whatever the language in the portion of section 99.825 identified above as part 3 may mean, it can not authorize substantive amendments to a redevelopment project previously adopted by ordinance where that reading is in direct conflict with section 99.820.*

B. Section 99.820 applies to amendments to existing projects and is not limited to amendments to proposed projects.

Respondents have argued that the requirement in section 99.820 of prior submission of amendments to redevelopment projects to the TIF Commission and the requirement that the TIF Commission conduct hearings and a vote on such amendments before they are adopted applies only to an a*mendment to a proposed redevelopment project*, rather than to an *amendment to an existing redevelopment project already*

adopted by ordinance, such as in the present case. This argument is based on language in section 99.820 of the TIF Act (see what has previously been identified as Part 2 of section 99.820) stating that the "commission shall vote on all *proposed* redevelopment plans, redevelopment projects and designations of redevelopment areas, *and amendments thereto.*" §99.820. However, this conclusion is inconsistent with other clear, direct language to the contrary in the same section stating that "members representing school districts and other taxing entities shall be appointed as provided in this section prior to *any amendments* to *any redevelopment plans, redevelopment projects, or designation of a redevelopment area*" and that the TIF commission shall "make recommendations to the governing body within ninety days of the hearing referred to in section 99.825 concerning the adoption of, *or amendment to* redevelopment plans and redevelopment projects . . ." §99.820.

In addition, the conclusion that TIF Commission referral is only required for amendments to proposed redevelopment projects rather than existing redevelopment projects simply makes no sense. A project not yet adopted by ordinance never requires amendment. Under the TIF Act, there is no such thing as an amendment to a proposed redevelopment project not yet adopted by ordinance, as opposed to a proposed amendment to a project previously adopted. This is clear from section 99.825, which in contrast to section 99.820, refers not to amendments but to "changes" that can be made to a project before it is adopted by ordinance. It is also clear from subdivision (7) of subsection 2 of section 99.820 (set forth herein as "Part 1" above), which plainly states

that after ***"final approval"*** of a redevelopment project, the TIF commission members representing school districts and other taxing districts drop off the Commission, "except that members representing school boards and other taxing districts ***shall be appointed*** as provided in this section ***prior to any amendments to any . . . redevelopment projects . . . .***" It could not be more plain from this language that it refers expressly to amendments to redevelopment projects that have been previously approved by ordinance. ("finally approved"). In the context of sections 99.820 and 99.825, and in particular the language identified above from section 99.820, the term "amendment" clearly contemplates a change to a redevelopment project previously adopted by ordinance. Therefore, Respondent's attempt to limit the requirement in section 99.820 to reappoint school board members to hear amendments to redevelopment projects previously adopted by ordinance to amendments to "proposed" projects must fail.

C. The City's Amendment changed the nature of the Redevelopment Project within the meaning of section 99.825.

Furthermore, even if it is *assumed* that Part 3 of section 99.825, as designated above, does grant authority to amend a previously adopted redevelopment project without TIF commission review, the City's Amendment would not be in compliance with this language. It expressly prohibits any ordinance changing the nature of the redevelopment project without complying with the procedures applicable to the initial approval of a redevelopment project, including prior TIF commission review. The actual amendment

of the Point Basse Redevelopment Project as stated in Ordinance 3057 attached to the Petition, including Exhibit B, documents substantial changes in the nature of the Redevelopment Project.[6]

First of all, the Redevelopment Project, as previously adopted by the City by Ordinance prior to the Amendment to that area, included only storm water improvements totaling $200,000, a water system extension totaling $50,000, and a sewer system extension totaling $100,000, for a combined total of $350,000 in infrastructure improvements relating solely to storm water, water and sewer systems. **L.F. *6*, ¶¶ 17-18; L.F. 17-18, 22**. The amendment, as it applies to the Point Basse Redevelopment Project, adds to the previously adopted infrastructure improvements $525,000 in costs for acquisition of property, $40,000 in costs for site preparation, $50,000 for relocation of utilities, $100,000 for road/signalization improvements, $160,000 for relocation of tenants, and $385,000 for parking lot improvements, representing an increase in development costs for this particular project by 360% over the previous costs submitted to and reviewed by the TIF Commission and approved by the City. **L.F. 6, ¶¶19-20; L.F.**

[6] The Point Basse Redevelopment Project represents a discrete redevelopment project within the meaning of the TIF Act, and is designated as a separate project under the redevelopment plan and projects. Thus, it is clear that the prohibition against changing the nature of the redevelopment project applies individually to this project, and not to all of the projects together as a group.

17-18. Thus, the Amendment changed the nature of the project by substantially increasing the costs of such project from $350,000 to $1,610,000.

Secondly, the Amendment to the Redevelopment Project included in the Ordinance expands the proposed uses of payments in lieu of taxes and economic activity taxes in such project area to include purposes not previously submitted to the Tax Increment Financing Commission or approved by ordinance, including the addition of property acquisition costs, site preparation costs, utility relocation costs, road/signalization improvement costs, tenant relocation costs, and parking lot improvement costs. **L.F. 6-7, ¶¶21-23; L.F. 22, 17-18**. Thus, the Amendment as adopted by Ordinance 3057 changes the nature of the Redevelopment Project by substantially changing the purposes for which payments in lieu of taxes and economic activity taxes will be used. In contrast to the previous purposes related to public infrastructure, the new purposes include substantial expenditures for private purposes, such as using public funds to reimburse the developer for its cost in purchasing the private property on which the project is located, using public funds to cover the developer's costs of relocating tenants (such as buying out leases), site preparation, and building a parking lot.

The term "nature" as stated in the prohibition in section 99.825 against adopting ordinances changing the nature of a redevelopment project without first submitting them to the TIF Commission should be interpreted consistent with the plain and ordinary dictionary definition of that word. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc

1983). The relevant definition of "nature" in the context of the statute, as defined in Webster's Third New International Dictionary, includes:

> "2a: the essential character of constitution of something <the ~ of the controversy> . . . ; esp. : the essence or ultimate form of something.
>
> b: the distinguishing qualities or properties of something <the ~ of mathematics> <the ~ of a literary movement>"

In addition, the term "nature" must be interpreted in light of the intent of the statute. *Boone County Court v. State,* 631 S.W.2d 321, 324 (Mo. banc. 1982). "When construing a statute, this Court must consider the object the legislature seeks to accomplish with an eye towards finding resolution to the problems addressed therein." *Gott v. Director of Revenue,* 5 S.W.3d 155, 159 (Mo. banc 1999). Appellants agree with Respondents that sections 99.820 and 99.825 are in pari materia and should be construed together. *Reece v. Reece,* 890 S.W.2d 706, 709-710 (Mo. App. 1995). Accordingly, the prohibition against changing the nature of a redevelopment project contained in section 99.825 should be interpreted in light of the requirements of section 99.820. In this case, it is obvious that the legislature gave school districts two seats on the TIF commission so that they could be involved in policy decisions relating to whether and how the their tax revenues could be diverted for other purposes. Interpreting section 99.825 in that context, the intent of the statutory prohibition against changing the nature of a redevelopment project without first submitting the issue to the TIF Commission is obviously to ensure that no ordinances that have the effect of making any significant

changes in a redevelopment project without the normal notice and hearing process by the TIF Commission. This preserves the statutory role of school districts and other taxing entities in protecting their interests in the disposition of what would otherwise become tax revenue.

Viewed in this light, it is apparent that a substantial increase in the cost of a project (360% in this case) is precisely the kind of change that would be of great concern to taxing entities that are forgoing their tax revenues. Under TIF, there is a direct relationship between the cost of the project and the loss of property tax revenue. A substantial increase in the cost of a project should for this reason be considered a change in the nature of a project. A 360% increase in the cost of a project should be considered a change in the nature of the project as a matter of law.

Likewise, it would be expected that the purpose for which redevelopment costs (and the resulting tax abatement) are proposed would be of great interest to school districts and other taxing bodies. As the record of this case reflects, while the taxing bodies on the TIF Commission might support abatement of taxes for purposes of public infrastructure, wholesale changes in the purpose via amendment resulting in expenditures for what are essentially private purposes (such as reimbursing a developer over a half-million dollars to purchase property for its private ownership) would be expected to be a subject of great concern to the TIF commission and should be considered to "change the nature" of the project for purposes of 99.825.

The term "nature" as used in 99.825, should also be evaluated in the context of the rest of that section. After the hearing, but prior to the adoption of an ordinance establishing a redevelopment project, the statute indicates that changes may be made that do not "***substantially*** change the nature" of the redevelopment project. However, once adopted by ordinance, **any** change in the nature of the project is prohibited under this section. This indicates that the prohibition against changing the nature of the project following the adoption of an ordinance is intended to be a *broad* prohibition.

Plaintiff's argue that the term "nature" in this context refers to the purpose of redevelopment so that the nature of the redevelopment project is not changed unless it is no longer in the "nature" of a redevelopment project. This has the effect of narrowly construing the prohibition, which is inconsistent with the context, purpose, and language of sections 99.820 and 99.825. "A statute should not be construed narrowly if such an interpretation would defeat the purpose of the statute." *Wilson v. Director of Revenue*, 873 S.W.2d. 328, 329 (Mo. App. E.D. 1994).

In the context of 99.820 and 99.825, the term "changing the nature" should be held to encompass any significant or substantial change in the cost, scope, or purpose of the redevelopment project. It is apparent on the face of the Ordinance, Exhibit B to the Ordinance, and the notice provided by the City to Appellants (all of which are included in Exhibit 1 to the Petition) that the Amendment completely changes the scope of the Point Basse Redevelopment Project by vastly expanding it and changing the uses of the

payments in lieu of taxes and economic activity taxes for such project. After the amendment, it is a completely different Redevelopment Project.

D. Appellants stated a claim for unconstitutional expenditures of public funds for a private purpose.

It is apparent why the City took its chances to avoid submission of the Amendment to the scrutiny of the TIF commission and the public.[7] The Amendment includes a plan to use payments in lieu of taxes and economic activity taxes collected on the property within the Point Basse Redevelopment Project for purposes of reimbursing more than one million dollars to a private party to cover the cost of purchasing the real estate, improving it, relocating exiting tenants on that real estate, and building a parking lot on that real estate. There is no repayment obligation, and the developer would directly receive the full monetary benefit of all of purchase and improvement of private property. The Petition details the proposed expenditures, alleges that a private party will receive the financial benefit of such expenditures, and alleges that this constitutes expenditures of public funds for private purposes, in violation of Article III, sections 38(a) and 39(1) and (2); and Article VI, sections 23 and 25.

Respondents appear to have argued below that any expenditure pursuant to a redevelopment project automatically qualifies as an expenditure for a public purpose.

[7] The City's attorneys obviously knew of the potential problem, and attempted to address it in section 3 of the Ordinance. However, the City has no authority to change the law's requirements with a "finding" that it is in compliance.

Accordingly, Respondents would apparently argue that TIF revenues could be given to a developer to spend on anything associated with the project, and that any resulting private benefit will be automatically deemed an "incidental benefit." However, there is nothing in the TIF Act that automatically excludes expenditures of funds held under TIF from the constitutional prohibitions against expending public funds for private purposes. In fact, the TIF Act itself indicates that the authority of the municipality under TIF to acquire and dispose of property is "subject to any constitutional limitations." §99.820.1(3), RSMo. Furthermore, the cases cited by the City in its Motion to Dismiss in the trial court as being "directly on point" actually have little or nothing to do with the constitutional issue in this case. The issue here is whether a municipality, pursuant to TIF, and without acquiring the property itself, may directly reimburse more than one million dollars in TIF payments received in lieu of taxes and economic activity taxes to a private party so that that party can purchase and improve real estate and buy out existing tenants, all for the financial benefit and use of the private party. The cases cited by City in the trial court in support of its claim that this issue has already been decided are listed and distinguished below.

State ex inf. Dalton v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 270 S.W.2d 44 (Mo. 1954). In this 46-year old case, which pre-dates the establishment of TIF by about twenty-eight years, the court held that the Land Clearance for Redevelopment Authority could in fact *acquire* land declared blighted, demolish existing structures, improve it, and sell it to private parties at a cost less than the cost of

acquisition, demolition and improvement, but for "fair value", without violating Article III, section 38(a), section 39, or sections 23 or 25 of Article VI. *Id.* at 52-53. The court stated, "It would be difficult to imagine a workable law that exacted more from a purchaser than a 'fair value' price." *Id.* at 53. In the case at bar, the City did not, and does not propose to acquire the property. It intends to reimburse the developer for its cost of acquisition and improvement.

In *State ex rel Atkinson v. Planned Industrial Expansion Authority*, 517 S.W.2d 36 (Mo. banc 1978), the plaintiffs argued that the statutory authority of the PIEU to issue tax-exempt debt, to grant property tax exemptions, and to acquire property by eminent domain violated Article III, section 38(a) and section 39(1) as well as Article VI, sections 23 and 25 as authorizing expenditure of public funds for a private purpose. The court held that such actions did not violate the constitution. The issues in that case have nothing to do with this case.

In *State ex rel. Jardon v. Industrial Development Authority*, 570 S.W.2d 666 (Mo. banc 1978), plaintiffs challenged the constitutionality of the Industrial Development Corporations Act under the argument that its authority to issue revenue bonds to fund facilities to be used by private corporations violated Article VI, sections 23 and 25, as well as Article X, section 3. *Id.* at 673. With respect to the claim under Article VI, sections 23 and 25, the court stated that these provisions were not violated by incidental benefits accruing to private parties, and that what constitutes a public purpose is primarily determined by the legislature. *Id.* at 674. It determined that revenue bonds issued for

commercial, industrial, agricultural and manufacturing facilities served a public purpose and did not violate Article VI, sections 23 and 25. It also held that there could be no lending of credit where the revenue bonds were payable from the income generated by the projects. *Id.* at 673-676. Appellants in the case at bar are not challenging any issuance of revenue bonds. In addition, because the TIF Act includes no express authority to make the expenditures challenged by Appellants, Appellants need not challenge the TIF Act.[8] Also, unlike revenue bonds, there is no payback required of the granted funds in this case. In *Tax Increment Financing Commission v. Dunn Construction Co.*, 781 S.W.2d 70 (Mo. banc 1989), Dunn argued that the city in that case had loaned its credit by issuing bonds. The Court simply cited its holding in *Jardon*, holding that the bonds were not a debt of the city. Again, Appellants are not challenging an issuance of bonds.

In *State ex inf. Danforth ex rel. Farmers Electrical Cooperative, Inc. v. State Environmental Improvement Authority*, 518 S.W.2d 68 (Mo. banc 1975), the plaintiffs challenged the State Environmental Improvement Authority's statutory authority to issue tax-exempt bonds as violative of Article III, section 38(a) and 39(1) and (2); as well as sections 23 and 26 of Article VI. The court held that the bonds were not an obligation of

[8] Redevelopment project costs and activities described in sections 99.805 and 99.820 are all consistent with public ownership of the property. The Act does not specify whether the permissible costs enumerated in these sections permit reimbursement of a private party's costs of purchasing and improving private property.

the state, and that therefore these provisions were not violated. *Id.* at 73-75. Again, this case is not about bonds.

According to the City, these cases are "squarely on point" and "dispense with the Plaintiffs' claims", which it referred to below as "false, baseless and frivolous." (Tr. 45-47) In reality, *not a single case stands for the proposition that a municipality, under TIF, may agree to grant substantial public funding to a private party for that party's use and financial benefit in purchasing and improving real estate and buying out existing leases, without any tangible corresponding benefit to the public.* None of the cited cases deal with direct appropriations of substantial public funds to private parties under TIF for the purposes described in the Petition.

A public purpose for purposes of the constitutional proscriptions has been described as:

> " . . . for the support of government or for some of the recognized objects of government, or directly to promote the welfare of the community. It may also be conceded that it is a public purpose from the attainment of which will flow some benefit or convenience to the public In this latter case, however, the benefit or convenience must be direct and immediate from the purpose, . . ." *State ex rel. Mitchell v. City of Sikeston*, 555 S.W. 2d 281, 285 (Mo. banc 1977).

Appellants acknowledge the quoted passages in a few of the cases cited above indicating that incidental benefits to private parties do not invalidate an expenditure that

otherwise has a public purpose. However, in this case, Respondent would argue that it is the public that is receiving the "incidental benefit" and the developer who appears to be the primary beneficiary of the City's Amendment. There is no apparent "direct and immediate" benefit to the public. Whether the City's action violates the constitutional provisions cited by Appellants is an open and substantial question of first impression.

The allegations in the Petition relating to this issue, include:

(1) the amendment would allow for payments in lieu of taxes and/or economic activity taxes to be used to fund or reimburse the costs of private parties to purchase and improve private property and to relocate existing tenants on private property;

(2) amounts totaling more than one million dollars were proposed by the amendment for expenditure for such purposes; and

(3) the amendment provides for the funding of the acquisition and improvement of private property by private parties (**L.F. 5-6, ¶19, 23, 26, 27; Appendix, 4-5**).

These substantial factual allegations, combined with the paragraphs stating that amounts received as payments in lieu of taxes would otherwise be received as taxes by the District, and that economic activity taxes are being used for such private purposes show that the School District and Stewart were entitled to a declaration of rights or status on the facts pleaded. *Superior Equipment Company, Incorporated v. Maryland Casualty Company*, 936 S.W.2d 190, 192 (Mo. App. 1996). By dismissing this claim, the trial court concluded as a matter of law that the use of more than one million dollars in public

funds to reimburse a private party's costs of purchasing and improving real estate *could not* violate the constitutional prohibitions against the use of public funds for private purposes. This conclusion does not "accept as true all the facts pleaded and all the reasonable inferences drawn therefrom in order to determine whether the petition states any grounds for relief." *Harness v. State Farm Mut. Auto. Ins. Co.,* 867 S.W.2d. 591, 592 (Mo. App. E.D. 1993).

CONCLUSION

For the reasons stated, Appellants respectfully request that the Court reverse the judgment of the trial court dismissing the Petition and declare the Amendment to the Point Basse Redevelopment Project contained in Ordinance 3057 void for failure to comply with sections 99.820 and/or 99.825, to remand the case to the trial court with directions if this Court determines that further proceedings in that court are necessary, and for such other relief as the Court may deem necessary and proper.

Respectfully Submitted,

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RULE 84.06 (c) CERTIFICATE

The undersigned states that the forgoing Substitute Brief of Appellant complies with the limitations contained in Rule 84.06(b), that such brief contains 13,678 words. In addition, the undersigned certifies that the disk containing this brief (excepting the Appendix) has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of Appellant's Substitute Brief, together with a disk copy of the brief, were served on each of the following attorneys for the parties this __ day of September, 2001 by mailing such copies each by First Class U.S. Mail to:

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